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9  
10 **UNITED STATES DISTRICT COURT**  
11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

12 NEELAM SANDHU, an individual,

13 Plaintiff,

14 vs.

15 BLACKBERRY CORPORATION; a  
Delaware Corporation; and JOHN  
GIAMATTEO; an individual,

16 Defendants.  
17

Case No. 3:24-cv-02002

**REPLY IN SUPPORT OF DEFENDANTS’  
MOTION TO DISMISS PLAINTIFF’S  
FIRST AMENDED COMPLAINT AND  
MOTION TO STRIKE**

Hearing Date: November 18, 2024  
Time: 9:30 AM  
Place: Courtroom C  
Judge: Sallie Kim

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1 **I. INTRODUCTION**

2 Plaintiff's Opposition fails to engage with the Court's prior ruling or the binding  
3 authorities on which it relied. Indeed, Plaintiff does not cite the Court's prior ruling even once in  
4 her Opposition—and her First Amended Complaint ("FAC") fails to resolve the deficiencies that  
5 the Court's prior order identified.

6 First, Plaintiff copies-and-pastes allegations from the FAC and summarily asserts that they  
7 are sufficient to constitute severe or pervasive sex harassment. But Plaintiff once again fails to  
8 address—or even cite—the leading California authorities on FEHA sex harassment claims,  
9 including *Hughes v. Pair*, 46 Cal. 4th 1035 (2009) and *Haberman v. Cengage Learning, Inc.*, 180  
10 Cal. App. 4th 365 (2009)—both cases relied upon in the Court's order dismissing Plaintiff's  
11 original complaint. *See* ECF No. 31 at 13–14. Instead, Plaintiff re-advances an erroneous theory  
12 that California Government Code section 12923 abrogated every FEHA sex harassment case  
13 decided prior to 2019. The Court already rejected that argument, ruling that *Hughes, Haberman*,  
14 and other pre-2019 cases "retain their precedential value to the extent not abrogated by Cal. Govt.  
15 Code § 12923." *Id.* at 13.

16 Next, Plaintiff asserts that new, general allegations characterizing John Giamatteo's body  
17 language and tone of voice suffice to survive the pleading stage because those characteristics  
18 "cannot be easily summarized in writing." ECF No. 38 at 10. That is not the law in federal court.  
19 The Supreme Court has made clear that "[a] plaintiff's obligation to provide the grounds of [her]  
20 entitle[ment] to relief requires more than labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550  
21 U.S. 544, 555 (2007) (internal quotation marks omitted). Considered without any of the  
22 conclusory labels Plaintiff has added, the new facts alleged in the FAC—including that Giamatteo  
23 "arrived at the dinner in different clothing," smelled of aftershave, and "made prolonged eye  
24 contact throughout the dinner," ECF No. 34 (hereinafter "¶ \_\_") at ¶ 40—still rise nowhere near  
25 the level of severity that the California Supreme Court rejected as *insufficient* to state a hostile  
26 environment claim in *Hughes*. *See* ECF No. 31 at 13 (relying on *Hughes*'s holding that a  
27 defendant's sexual remarks to plaintiff, including that he would "get [her] on [her] knees  
28 eventually" and "fuck [her] one way or another," did not establish a hostile environment).

1 Plaintiff also urges the Court to consider her allegations of ordinary, nonsexual workplace  
 2 friction as support for her FEHA claim. For the first time, she attempts to frame her claim as  
 3 “gender harassment” and argues that Defendants have “seem[ed] to confuse [it] with sexual  
 4 harassment.” ECF No. 38 at 8. In reality, gender harassment and sexual harassment are both  
 5 forms of harassment on the basis of sex under FEHA, and both require a plaintiff to show that the  
 6 harassing conduct took place “because of” sex or gender. Cal. Gov’t Code § 12940(j).  
 7 Defendants have never suggested that Plaintiff must plead facts regarding unwelcome sexual  
 8 conduct, such as lewd acts or sexual advances. Defendants have maintained only that she must  
 9 plead what FEHA requires: facts demonstrating that the alleged harassment took place *because of*  
 10 her sex. Plaintiff has failed to do so, and her Opposition fails to engage with the Ninth Circuit and  
 11 district court case law (cited in Defendants’ motion) that holds that a plaintiff may not plead a sex  
 12 harassment claim by offering only conclusory assertions that conduct was tied to her sex. *See*  
 13 ECF No. 37 at 16–17.

14 Plaintiff’s reliance on *Accardi v. Superior Court*—a case involving a female police officer  
 15 who was subjected to continuous, overt acts of sexual harassment for over a decade—in particular  
 16 gets her no further. 17 Cal. App. 4th 341 (1993), *as modified on denial of reh’g* (Aug. 20, 1993).  
 17 *Accardi* stands for a proposition Defendants have not disputed: Sexual harassment can be based  
 18 on non-sexual workplace conduct, as long as a plaintiff has *also* pled facts establishing that the  
 19 conduct occurred *because of her sex*. *See id.* at 348 (“To plead a cause of action for this type of  
 20 sexual harassment, it is ‘only necessary to show that gender is a substantial factor in the  
 21 discrimination, and that if the plaintiff had been a man she would not have been treated in the  
 22 same manner.’” (quoting *Tomkins v. Publ. Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1047 n.4 (3d  
 23 Cir. 1977))). That is the showing Plaintiff has failed to make under the federal standard. *See* ECF  
 24 No. 37 at 15–17.

25 *Accardi*, moreover, highlights the inadequacy of Plaintiff’s allegations. In *Accardi*, the  
 26 court found that non-sexual conduct was part of a campaign of sexual harassment where a plaintiff  
 27 had been subjected to years of facially gendered statements and abuse. *See Accardi*, 17 Cal. App.  
 28 at 351; *see also id.* at 346 (highlighting that plaintiff’s male coworkers made “statements that her

baton was only useful to perform sex acts,” “spread[] rumors that she had slept with superior officers in order to receive favorable assignments,” and “admitt[ed] to her that there were double standards and t[old] her she must live with them”). Only in combination with a litany of overt sex-based hostility did the court agree that *other* workplace acts committed against the plaintiff, including unsubstantiated complaints about her performance and untrue rumors about her abilities, were plausibly related to her sex. *Id.* at 350–51. In contrast, Plaintiff has failed to assert any plausible, specific allegations of sex-based statements or conduct to pair with her laundry list of alleged workplace grievances.

Plaintiff’s discriminatory pay claim likewise fails. As Defendants argued, Plaintiff must plead facts showing that she performed “substantially similar work” as her male colleagues at BlackBerry “when viewed as a composite of skill, effort, and responsibility.” Cal. Lab. Code § 1197.5. Plaintiff has failed to allege any facts suggesting that her job required similar skill and responsibility as the company’s two Presidents, Giamatteo and Mattias Eriksson. To the contrary, the documents that Plaintiff attached to the FAC confirm that she occupied a lower-level role requiring a substantially different level of skill and responsibility than a company President.<sup>1</sup> *See* ECF No. 38 at 12–13 (first citing *Freyd v. Univ. of Oregon*, 990 F.3d 1211 (9th Cir. 2021) (comparing plaintiff with other tenured professors in the Psychology Department); and then citing *Duke v. City Coll. of San Francisco*, 445 F. Supp. 3d 216, 230 (N.D. Cal. 2020) (comparing plaintiff with other associate vice chancellors of student affairs)).

## II. ARGUMENT

### A. Plaintiff Has Failed to Plead a Plausible Claim for Sex Harassment.

Plaintiff makes several flawed arguments in opposing the dismissal of her sexual harassment claim. *First*, Plaintiff incorrectly claims that a statement of legislative intent passed in

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<sup>1</sup> *See* BlackBerry Executive Team Web Page, <https://www.blackberry.com/us/en/company/leadership>, as accessed by the Wayback Machine for December 7, 2023. <https://web.archive.org/web/20231207140955/https://www.blackberry.com/us/en/company/leadership> (hereinafter “BlackBerry Executive Team Web Page”); *see also* ECF No. 34 at 6 nn.1–3 (citing same). The BlackBerry Executive Team Web Page is attached to Defendants’ Motion as Appendix A. *See* ECF No. 37, app. A.

2019, Cal. Gov’t Code § 12923, changed the pleading standard for severe or pervasive harassment—an argument this Court has already rejected. *Second*, Plaintiff erroneously asserts that the FAC’s allegations about Giamatteo’s demeanor survive the federal pleading standard. *Third*, Plaintiff falsely asserts that she has pled severe or pervasive conduct under the “totality of circumstances,” despite the fact that she has not pled incidents that might meet that standard, even when taken together. ECF No. 38 at 10. *Finally*, Plaintiff falsely claims that everyday workplace grievances can support a sexual harassment claim, even though Plaintiff has not pled any facts tying that alleged conduct to her sex.<sup>2</sup> In doing so, Plaintiff declines to engage with Ninth Circuit and district court case law, cited in Defendants’ motion, holding that conclusory allegations that conduct is tied to sex do not suffice under the federal pleading standard to convert ordinary workplace slights to sexual harassment.

**1. Plaintiff Has Not Pled Severe or Pervasive Harassment Under the Governing Case Law.**

Plaintiff’s Opposition fails to engage with the leading California authorities on FEHA sexual harassment claims—including the California Supreme Court’s holdings in *Lyle* and *Hughes*, and the California Court of Appeal’s holding in *Haberman*. Those cases make it clear that Plaintiff’s allegations do not meet the “severe or pervasive” element required to state a sexual harassment claim. *Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264, 278–79 (2006) (plaintiff must show she was “subjected to sexual advances, conduct, or comments that were (1) unwelcome; (2) because of sex; and (3) sufficiently severe or pervasive to alter the conditions of her employment and create an abusive work environment” (citations omitted)); *see also Hughes*,

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<sup>2</sup> Plaintiff asks the Court to disregard a paragraph in Defendants’ Motion that discusses facts not in the FAC. ECF No. 38 at 4. Defendants do not ask the Court to consider those facts in deciding this Motion or to accept them as true. Rather, Defendants included the paragraph to provide brief context about the case.

Plaintiff also asks the Court to disregard the redline attached to Defendants’ Motion. ECF No. 38 at 4–5. Defendants provided the redline solely for the Court’s ease of reference in evaluating amendments to the FAC. *See, e.g., Space Data Corp. v. X*, No. 16-CV-03260-BLF, 2017 WL 11503233, at \*2 (N.D. Cal. Sept. 25, 2017) (noting that plaintiff filed a redlined comparison of the second amended complaint and third amended complaint).



1 46 Cal. 4th at 1040, 1043 (three isolated sexual remarks, including the statement defendant would  
 2 “get [plaintiff] on [her] knees eventually” and “fuck [her] one way or another,” were insufficient  
 3 to constitute sex harassment); *Haberman*, 180 Cal. App. 4th at 383–84 (numerous sexual jokes,  
 4 remarks about plaintiff’s appearance, and explicit discussions of sex with plaintiff were  
 5 insufficient to show pervasive or severe harassment).

6 Recognizing she cannot prevail under these authorities, Plaintiff ignores them and recycles  
 7 an argument that section 12923 effectively overruled all pre-2020 authorities. *See, e.g.*, ECF No.  
 8 38 at 7 (summarizing “[t]he [c]urrent [l]aw on the ‘[s]evere and [p]ervasive’ [r]equirement” and  
 9 citing only section 12923); *id.* (warning the Court “to be wary about relying on pre-2020 case  
 10 law”). But the Court already rejected Plaintiff’s argument in ruling on Defendants’ prior motion  
 11 to dismiss, holding that, “[w]hile Plaintiff is correct about the shift in California law, insofar as it  
 12 clarifies the statute generally . . . this legislative clarification did not alter the law on how courts  
 13 are to interpret ‘severity’ or ‘perv[asiv]eness’ of alleged conduct. Thus, cases preceding the 2019  
 14 amendment retain their precedential value to the extent not abrogated by Cal. Govt. Code §  
 15 12923.” ECF No. 31 at 12–13. With good reason: California courts have continued to rely on  
 16 *Hughes*, *Lyle*, and *Haberman* as governing law since the 2019 amendments took effect—including  
 17 in ruling on motions to dismiss.<sup>3</sup> As Defendants explained in prior briefing on this issue, even  
 18 *Thomas v. Regents of University of California*, a 2023 case on which Plaintiff has relied  
 19 extensively in her briefing, applied both *Lyle* and *Hughes* for its substantive analysis of sexual  
 20 harassment. *See Thomas v. Regents of Univ. of Cal.*, 97 Cal. App. 5th 587, 608 (2023), *reh’g*  
 21 *denied* (Dec. 29, 2023), *review denied* (Feb. 28, 2024); *see also* ECF No. 26 at 6–7 (discussing  
 22 same). Plaintiff’s failure to respond to Defendants’ arguments applying *Lyle* and *Hughes* is  
 23 telling—she has not pled severe or pervasive harassment under those cases.

## 24 **2. Plaintiff Cannot Rely on Vague and Conclusory Allegations to Plead a** 25 **Sex Harassment Claim.**

26 The Court previously dismissed Plaintiff’s sex harassment claim because she had advanced  
 27

28 <sup>3</sup> Defendants previously provided a long list of such cases. *See* ECF No. 26 at 14 n.3.

1 “a multitude of bald assertions of legal conclusions, as well as vague allegations.” ECF No. 31 at  
2 15. Yet Plaintiff’s Opposition erroneously suggests that she can rely on *additional* vague and  
3 conclusory allegations about Giamatteo’s demeanor—such as that “his tone of voice had sexual  
4 undertones,” ¶ 40—to plead a sex harassment claim. Plaintiff’s arguments misapprehend the  
5 pleading standard in federal court.

6 Plaintiff first argues that Defendants are “demand[ing] a level of specificity not required by  
7 the law,” because Federal Rule of Civil Procedure 8(a)(2) states that a complaint requires only a  
8 “short and plain” statement of a claim. ECF No. 38 at 10. But it is well-settled that a plaintiff  
9 cannot state a claim for relief by pleading “labels and conclusions,” or “naked assertions” devoid  
10 of “further factual enhancement.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations omitted).  
11 Courts routinely dismiss claims where, as here, a complaint relies on “vague and conclusory  
12 allegations of harassment” that are not based on articulable facts. *See Hatfield v. DaVita*  
13 *Healthcare Partners, Inc.*, No. C 13–5206 SBA, 2014 WL 2111237, at \*6 (N.D. Cal. May 20,  
14 2014) (dismissing FEHA claim where plaintiff made “vague and conclusory allegations of  
15 harassment”); *Peterson v. U.S. Bancorp Equip. Fin., Inc.*, No. C 10–0942 SBA, 2010 WL  
16 2794359, at \*3 (N.D. Cal. July 15, 2010) (dismissing hostile environment claim where plaintiff’s  
17 allegations were “too vague and conclusory to state a claim for sexual harassment”).

18 Plaintiff has alleged a multitude of vague and conclusory statements about Giamatteo’s  
19 behavior, often labeling it as “sexual” or “suggestive,” without providing “salient fact[s]” to back  
20 up those descriptions. *See* ECF No. 31 at 15. For example, Plaintiff alleges again that Giamatteo  
21 asked her to work for him and travel together. ¶ 39. She has added in the FAC that his “tone was  
22 sexually suggestive” and it was an “unwelcome exchange which made [her] very uncomfortable.”  
23 *Id.* But these do not constitute *facts* about anything Giamatteo said or did that could plausibly  
24 constitute sexual harassment. Plaintiff’s allegations follow this same script throughout the FAC.  
25 When describing the one-on-one dinner she attended with Giamatteo, Plaintiff alleges that “his  
26 behaviors exhibited sexual undertones”; “his body language was sexually suggestive”; and his  
27 “tone of voice had sexual undertones.” ¶ 40. Again, these are not facts: They are conclusory  
28 labels that add little substance, if any, to Plaintiff’s allegations.

1 Plaintiff also contends that she could not easily summarize Giamatteo’s “subtle gestures  
 2 and vocal inflections” in writing, and therefore a jury should be allowed to decide whether his  
 3 behavior was “benign or sinister.” ECF No. 38 at 10. But that argument ignores that allegations  
 4 in federal court “must contain sufficient factual matter . . . to state a claim to relief that is plausible  
 5 on its face.” *Iqbal*, 556 U.S. at 678. Federal courts do not “accept as true allegations that are  
 6 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Sprewell v.*  
 7 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

8 Plaintiff also ignores that sex harassment must be both subjectively and *objectively* severe  
 9 to be actionable. It is not sufficient for Plaintiff to plead her subjective experience, such as that  
 10 her exchanges with Giamatteo were “unwelcome” or made her “uncomfortable.” Harassment  
 11 must satisfy both a subjective and an objective standard, with the “objective severity of  
 12 harassment . . . judged from the perspective of a reasonable person in the plaintiff’s position,  
 13 considering all the circumstances.” *Ortiz v. Dameron Hosp. Ass’n*, 37 Cal. App. 5th 568, 583  
 14 (2019) (internal quotation marks and citation omitted). Plaintiff’s vague and conclusory  
 15 allegations do not plausibly show objective severity.

### 16 **3. Plaintiff’s Newly Alleged Facts Do Not Cure Her Failure to Allege** 17 **Severe or Pervasive Conduct.**

18 In its order granting Defendants’ motion to dismiss Plaintiff’s prior complaint, the Court  
 19 found that Plaintiff had alleged only “three sets of allegations that could relate to a claim for  
 20 hostile work environment” and that those incidents, “either individually or taken together, do not  
 21 allege behavior that is severe or pervasive.” See ECF No. 31 at 14.<sup>4</sup> In the FAC, Plaintiff has  
 22 added only one entirely new allegation: that Giamatteo allegedly “inappropriately touched” an  
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24 <sup>4</sup> The Court identified the three allegations as follows: First, that “Giamatteo asked Plaintiff to  
 25 work for him and did not give Plaintiff a ‘business reason’ as to why”; Second, that “Giamatteo  
 26 had invited Plaintiff to dinner and attempted to ‘woo’ her”; And third, that Giamatteo was “overly  
 27 friendly” during the dinner and made a comment about himself being perceived as a “dirty old  
 28 man” when out with his daughters. See ECF No. 31 at 14; see also ¶ 39 (Giamatteo’s alleged  
 comment about traveling with Plaintiff for work), ¶¶ 40–41 (the alleged after-work dinner between  
 Giamatteo and Plaintiff), ¶ 41 (Giamatteo’s alleged joke about how he is perceived when in public  
 with his daughters).

1 unidentified woman in an unspecified way at an unspecified BlackBerry event on an unspecified  
 2 date.<sup>5</sup> See ¶ 93. Plaintiff has also added the allegation that, when Giamatteo allegedly told  
 3 Plaintiff he had a large network and could impact her career if she was not nice to him, Giamatteo  
 4 allegedly “emphasized the word ‘nice’ in a manner that was sexually suggestive.” ¶ 44.<sup>6</sup> None of  
 5 these five incidents could plausibly be characterized as sexual harassment, and none cure her  
 6 failure to allege pervasive or severe harassment.

7 Plaintiff claims in her Opposition that Defendants erred by “analyzing incidents in  
 8 isolation, rather than as a whole.” ECF No. 38 at 9. Plaintiff also claims that she is “not required  
 9 to plead a particular number of incidents of harassment” to demonstrate either severity or  
 10 pervasiveness because only one incident can suffice. *Id.* Both arguments are inconsistent with the  
 11 weight of precedent and with the Court’s analysis in assessing Plaintiff’s initial complaint.

12 Contrary to Plaintiff’s claims, courts routinely count and analyze the number of incidents  
 13 of alleged harassment to determine whether conduct is pervasive or severe. In *Haberman*, for  
 14 example, the court counted that plaintiff had alleged thirteen incidents of harassment against her  
 15 male coworker. Among these incidents, the plaintiff alleged that her coworker joked in her  
 16 presence about the size of his penis; remarked that she was “pretty” and “‘drop dead’ gorgeous”;  
 17 told her on the phone while trailing her in his car that he was “coming right up behind her and it  
 18 felt pretty good”; expressed interest in casual sex and asked on two occasions whether plaintiff  
 19 had any friends who just wanted to have sex; and asked plaintiff how she knew whether someone  
 20 was “good in bed.” 180 Cal. App. 4th at 383–84. The court concluded that these “brief and  
 21 isolated” comments over a two- to three-year period did not establish conduct sufficiently severe

22  
 23 <sup>5</sup> As Defendants stated in their Motion, this allegation is so non-specific that it must be  
 24 disregarded. See ECF No. 37 at 13–14. Plaintiff has failed to explain how she became aware of  
 25 this incident or how it allegedly contributed to a hostile work environment for her. Plaintiff also  
 does not address this allegation or Defendants’ discussion about it in her Opposition.

26 <sup>6</sup> Plaintiff’s initial complaint alleged that Giamatteo had told Plaintiff he had a large network and  
 27 could impact her career if she was not nice to him, but did not include the additional claim that he  
 28 “emphasized the word ‘nice’ in a manner that was sexually suggestive.” Compare ECF No. 1 at ¶  
 35 with FAC at ¶ 44. Therefore, the Court’s prior order did not identify the one-on-one meeting as  
 one of Plaintiff’s allegations that could relate to hostile work environment. See ECF No. 31 at 14.

1 or pervasive to sustain a sex harassment claim. *Id.* at 385. Other courts have followed the same  
 2 conceptual approach. *See Graves v. DJO, LLC*, No. 20-CV-1103 W (KSC), 2023 WL 3565077, at  
 3 \*17 (S.D. Cal. Mar. 30, 2023) (holding that “three alleged acts of harassment” over a 13-month  
 4 period fell far short of establishing “a pattern of continuous, pervasive harassment”). Indeed, it is  
 5 difficult to imagine how a court could determine whether conduct was pervasive without  
 6 evaluating how often it occurred.

7 It is true, as Plaintiff argues, that a single incident of harassing conduct *can* be sufficiently  
 8 severe to state a claim for sex harassment. But none of the incidents in Plaintiff’s complaint rise  
 9 to that level. The case Plaintiff cites to demonstrate a single actionable incident of harassment,  
 10 *Bailey v. San Francisco District Attorney’s Office*, 16 Cal. 5th 611 (2024), is remarkably  
 11 distinguishable. *Bailey* involved an African-American plaintiff who alleged that her coworker  
 12 called her the N-word. *Id.* at 619. The court, emphasizing that the N-word was in some ways  
 13 uniquely poisonous, concluded that use of racial epithets could create a hostile work environment  
 14 based on even a single incident.<sup>7</sup> *Id.* at 631 (noting “the odious and injurious nature of the N-word  
 15 in particular”). Plaintiff has not alleged anything that remotely approaches the severity of the  
 16 incident in *Bailey*. Indeed, courts have determined that far more serious incidents of sex  
 17 harassment were not sufficiently severe to state a sex harassment claim. *See Hughes*, 46 Cal. 4th  
 18 at 1040 (defendant’s comments to plaintiff that he would “get [her] on [her] knees eventually” and  
 19 “fuck [her] one way or another” did not constitute severe harassing conduct).

20 Plaintiff does not seriously argue that she has alleged any severe incidents in the FAC—  
 21 because she has not. With respect to her one-on-one dinner with Giamatteo, she alleges that he  
 22 changed clothes before coming to dinner and that he was wearing aftershave. ¶ 40. She also  
 23 alleges that he “looked [her] up and down when they met”; “leaned over the table” in an  
 24 “attempt[] to touch her hands/arms”; “made prolonged eye contact”; and, when leaving the  
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26 <sup>7</sup> The court also noted that the plaintiff and the coworker who used the epithet had to work in  
 27 physically close quarters and coordinate to cover each other’s work. *Bailey*, 16 Cal. 5th at 633  
 28 (“[A] coworker whom one sees at the water cooler is quite different than a coworker with whom  
 one shares an office space or work duties.”).

1 restaurant, “attempted to walk very close” to her and “again touch[ed] her” (though there is no  
 2 allegation that Giamatteo touched her a first time). *Id.* Under binding case authorities, none of  
 3 this could plausibly constitute a severe incident of harassing conduct.

4  
 5 **4. Plaintiff Has Not Pled That Her Ordinary, Workplace Grievances  
 Occurred “Because of” Sex.**

6 Like Plaintiff’s initial complaint, the amended complaint alleges a laundry list of non-  
 7 sexual workplace frictions. Like Plaintiff’s initial complaint, the amended complaint also fails to  
 8 plead any non-conclusory connection between those workplace slights and Plaintiff’s sex.

9 Both gender harassment and sexual harassment require a causal link between the alleged  
 10 harassing conduct and the person’s sex or gender. *See, e.g., Doe By & Through Doe v. Petaluma*  
 11 *City Sch. Dist.*, 949 F. Supp. 1415, 1425 (N.D. Cal. 1996) (alleged harasser must “intend to select  
 12 the recipient of his conduct on the basis of her gender, that is, to engage in disparate treatment  
 13 based on sex”). Plaintiff argues, and Defendants agree, that she is not required to plead facts  
 14 showing that Giamatteo’s conduct was motivated by sexual desire. ECF No. 38 at 7–8.  
 15 Defendants have never adopted that position: Instead, Defendants highlighted that Plaintiff must  
 16 plead facts showing that her allegations occurred “because of” her sex—in other words, that she  
 17 must plead some *facts* suggesting that her alleged mistreatment in the workplace was motivated by  
 18 her sex or gender. *See* ECF No. 37 at 17.

19 Like Plaintiff’s original complaint, the FAC has failed to plead *any* non-conclusory facts  
 20 tying the various workplace slights Plaintiff complains of to her sex. The FAC claims that  
 21 Giamatteo created a “boy’s club” at BlackBerry and then asserts that he “would mistreat, harass,  
 22 and marginalize women with impunity.” ¶ 35. The FAC includes no factual details about these  
 23 other women, or the circumstances of their alleged mistreatment, harassment, or marginalization.  
 24 Plaintiff also repeatedly adds a conclusory refrain to the various workplace slights the FAC  
 25 describes: that “[m]ale co-workers were not treated” the same way. ¶ 37; *see also* ¶¶ 50–53, 55,  
 26 56 (concluding that Giamatteo “was not harassing men in this manner”). Plaintiff’s Opposition  
 27 ignores Ninth Circuit precedent rejecting that approach. In *Austin*, the Ninth Circuit held that a  
 28 complaint did not adequately plead sex discrimination by simply claiming that complained-of

1 conduct was related to sex, or by including the bare allegation that members of the other sex were  
2 treated differently. *See Austin v. Univ. of Oregon*, 925 F.3d 1133, 1138 (9th Cir. 2019) (complaint  
3 alleging that female students were not treated the same way as male students was insufficient to  
4 show university was biased against men). As the *Austin* court explained: “Just saying so is not  
5 enough. A recitation of facts without plausible connection to gender is not cured by labels and  
6 conclusory statements about sex discrimination.” 925 F.3d at 1138. Plaintiff’s Opposition fails to  
7 grapple with that case law—or to engage with the many district court cases Defendants’ motion  
8 cited for the same conclusion. *See* ECF No. 37 at 17 (collecting cases rejecting complaints that  
9 tied conduct to sex only by stating that conclusion, or by pleading bare assertions that members of  
10 the opposite sex were treated differently).

11 Plaintiff also asks the Court to consider all the allegations in the FAC as one continual  
12 pattern of harassment, citing *Accardi v. Superior Court*, 17 Cal. App. 4th 341. But the facts in  
13 *Accardi* were not remotely similar to Plaintiff’s allegations. From the very day the *Accardi*  
14 plaintiff started work, “she was advised that male officers did not wish to have a female officer on  
15 patrol with them.” *Id.* at 350. For the next decade, she was subjected to an ongoing campaign of  
16 overt sex harassment from her coworkers, including acts like: “making statements that her baton  
17 was only useful to perform sex acts”; “spreading rumors that she had slept with superior officers  
18 in order to receive favorable assignments”; “admitting to her that there were double standards and  
19 telling her she must live with them”; “allowing derogatory and condescending remarks to be made  
20 about her, and women in general; and making sexual advances to her.” *Id.* at 346. At the same  
21 time, the *Accardi* plaintiff was subject to non-overtly sexual acts, as coworkers spread rumors  
22 about her, singled her out for unfavorable shifts, complained about her performance, and other  
23 similar behaviors. *Id.*

24 The *Accardi* court considered all of the plaintiff’s allegations as part of her sex harassment  
25 claim because she had sufficiently demonstrated “a continuous manifestation of a sex-based  
26 animus.” *Id.* at 351. That reasoning does not apply here. Plaintiff has pointed to, at best, five  
27  
28



1 isolated incidents with Giamatteo—none of which are overtly gendered.<sup>8</sup> Unlike the plaintiff in  
 2 *Accardi*, who pled a range of specific and explicitly gendered-comments from coworkers—  
 3 including that they did not want a woman working alongside them—Plaintiff offers no non-  
 4 conclusory allegations that tie the workplace treatment she complains of to sex. *See* ECF No. 37  
 5 at 16 (detailing conclusory allegations and absence of facts). She does not allege, for example,  
 6 that Giamatteo made a derogatory comment about women, told crude or sexist jokes, or engaged  
 7 in any other behavior that plausibly evidences “sex-based animus.” *Accardi* is thus no help to her.

8 *Accardi* also does not stand for the proposition that a plaintiff can plead sex harassment by  
 9 relying on nongendered, ordinary allegations of workplace friction without pleading facts from  
 10 which a court can infer that the events occurred due to the plaintiff’s sex. To the contrary, it holds  
 11 that a Plaintiff relying on non-gendered workplace slights must “*show* that gender is a substantial  
 12 factor in the discrimination and that if the ‘plaintiff had been a man, she would not have been  
 13 treated in the same manner.’” 17 Cal. App. 4th at 348 (emphasis added) (quoting *Thomkins*, 568  
 14 F.2d at 1047). *Showing* that the ordinary workplace friction is linked to Plaintiff’s gender or  
 15 would not have occurred if she was a man is precisely what Plaintiff’s FAC fails to do.

#### 16 **B. Plaintiff Has Not Pled Facts Showing Sex Discrimination in Pay.**

17 Plaintiff has also failed to state a claim that BlackBerry violated California’s prohibition  
 18 against discriminatory pay. Although Plaintiff alleges that she performed certain job duties in  
 19 common with the President of the Cyber Business Unit (Giamatteo) and the President of  
 20 BlackBerry’s Internet of Things Business Unit (Mattias Eriksson), she fails to allege that her role  
 21 at BlackBerry required similar skill or responsibility. Nor could she: As documents attached to  
 22 the FAC reveal, Plaintiff was not a President at BlackBerry and did not occupy an equivalent  
 23

24 <sup>8</sup> The “decade-long campaign” of harassment in *Accardi* was also part of a broader culture of  
 25 workplace sexual harassment among coworkers and supervisors. *Accardi*, 17 Cal. App. 4th at  
 26 350–51. Plaintiff has pled that Giamatteo alone committed the five alleged incidents of sex  
 27 harassment in the Complaint. Yet she asks the Court to consider that he “and other white males”  
 28 engaged in a host of “harassment” at work, including excluding her from meetings, laughing at her  
 when she talked in meetings, and downgrading her contributions. ¶ 36. As with Giamatteo,  
 Plaintiff has pled no facts that would allow the court to infer that these men acted with sex-based  
 animus.



1 leadership role within the company.<sup>9</sup> *See Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th  
 2 Cir. 2008) (courts “need not accept as true allegations contradicting documents that are referenced  
 3 in the complaint”). Section 1197.5 requires a plaintiff to identify comparators who performed  
 4 “substantially similar work, when viewed as a composite of skill, effort, and responsibility.” Cal.  
 5 Lab. Code § 1197.5. Plaintiff’s allegations do not satisfy these elements.

6 Plaintiff’s Opposition entirely ignores the “responsibility” element of section 1197.5,  
 7 presumably because it is fatal to her claim. Equal responsibility turns on “the degree of  
 8 accountability required in the performance of the job, with emphasis on the importance of the job  
 9 obligation.” 29 C.F.R. § 1620.17(a). Plaintiff has pled no facts to suggest that her roles at  
 10 BlackBerry—which were at various times Chief Marketing Officer, Chief Customer Success  
 11 Officer, and/or Head of Sustainability—required similar responsibility as serving as a President of  
 12 the company. In fact, the FAC strongly suggests that Plaintiff’s job required less responsibility, as  
 13 she admits that she had a “significantly smaller team than Giamatteo had supporting him.”<sup>10</sup> ¶ 34.  
 14 Courts routinely dismiss claims where plaintiffs fail to compare their responsibilities with those of  
 15 their comparators. *See* ECF No. 37 at 20–21 (listing cases).

16 Plaintiff also claims that she has alleged “equal skill” to Giamatteo and Eriksson because  
 17 “all used general managerial and executive skills at BlackBerry.” ECF No. 38 at 13. That is not  
 18 how courts analyze the equal skill component of section 1197.5. As Defendants explained, equal  
 19 skill includes “such factors as experience, training, education, and ability,” as measured “in terms  
 20 of the performance requirements of the job” at issue. 29 C.F.R. § 1620.15(a). Merely using the  
 21 same *types* of skills does not establish that the roles required the *same level* of skill. Indeed, the  
 22 BlackBerry Executive Team Web Page, referenced in the FAC, reveals that Giamatteo and

23  
 24 <sup>9</sup> *See* ECF No. 37, app. A (BlackBerry Executive Team Web Page).

25 <sup>10</sup> On the BlackBerry Executive Team Web Page she cites in the FAC, Plaintiff was not listed  
 26 alongside the company presidents. *See* ECF No. 37, app. A (BlackBerry Executive Team Web  
 27 Page). She appeared instead in a separate section lower down the page titled “Senior Leaders,”  
 28 alongside other lower-ranking executives.

1 Eriksson’s roles required materially different skills from Plaintiff’s in terms of education and prior  
2 work experience. *See* ECF No. 37 at 20 (comparing backgrounds for the jobs). Plaintiff claims  
3 that Defendants’ “focus on the individuals’ resumes is unavailing,” but to the contrary, these facts  
4 demonstrate that Plaintiff’s role did not require substantially similar skill when considering her  
5 experience and education. ECF No. 38 at 13.

6 The two cases Plaintiff relies on to claim that her allegations are sufficient under section  
7 1197.5 involved plaintiffs who—unlike Ms. Sandhu—held *the same position* as their alleged  
8 comparators. In *Freyd v. University of Oregon*, the court determined there was a triable issue of  
9 fact as to whether a plaintiff shared substantially similar jobs with three other comparators. 990  
10 F.3d 1211 (9th Cir. 2021). All of the comparators were tenured professors in the Psychology  
11 Department, meaning they would all “conduct research, teach classes, advise students, and serve  
12 actively on departmental, college, and university committees and in other roles in service to the  
13 institution.” *Id.* at 1220–21. Given the overwhelming similarities, the court held that it did not  
14 matter if the professors “do not teach the same courses, or supervise the same doctoral students, or  
15 manage the same centers.” *Id.* The differences in this case are far more stark: Plaintiff is  
16 comparing herself to higher-level executives with whom she did not share the same job position.

17 The other case on which Plaintiff relies, *Duke v. City College of San Francisco*, is equally  
18 unhelpful to her. 445 F. Supp. 3d 216 (N.D. Cal. 2020). *Duke* involved an associate vice  
19 chancellor of student affairs who alleged he performed substantially similar work as another  
20 associate vice chancellor of student affairs. *Id.* at 230. The court explained that “[i]t is reasonable  
21 to conclude that two associate vice chancellors overseeing the same area of responsibility (i.e.,  
22 student affairs) would have the same job responsibilities.” *Id.* These facts do not support  
23 Plaintiff’s claim in this case, where she has offered comparators with vastly different seniority, job  
24 titles, and degrees of responsibility over other team members. *See also* ECF No. 37 at 19  
25 (collecting Equal Pay Act cases with comparators who occupy the same jobs).<sup>11</sup>

26  
27 <sup>11</sup> As Defendants argued in their Motion, Plaintiff failed to compare her pay to either Giamatteo’s  
28 or Eriksson’s quantitatively, which suggests that she was likely paid far less. Plaintiff takes issue  
with this argument in her Opposition, pointing out that “the size of the pay disparity” is not a

1 Finally, the Court should reject Plaintiff's assertion that she may be able to identify  
 2 additional comparators through discovery. Plaintiff should know whether any other executive at  
 3 BlackBerry performed substantially similar work as her. And even if she does not have that  
 4 knowledge, a plaintiff may not rely on "anticipated discovery to satisfy" pleading obligations;  
 5 "rather, pleadings must assert well-pleaded factual allegations to advance to discovery." *Whitaker*  
 6 *v. Tesla Motors, Inc.*, 985 F.3d 1173, 1177 (9th Cir. 2021).

7 **C. Plaintiffs' Claims Should Be Dismissed with Prejudice.**

8 Defendants argued in their Motion that Plaintiff's claims for hostile work environment and  
 9 discriminatory pay should be dismissed with prejudice. Plaintiff does not address this argument in  
 10 her Opposition. Since the request is unopposed, and further amendment would be futile,  
 11 Defendants respectfully request that the claims be dismissed with prejudice.

12 **D. The Court Should Strike Plaintiff's Harassment Allegations from Her Fourth**  
 13 **Cause of Action, Along with References to Unequal Pay in Her Discrimination**  
**Claim.**

14 Plaintiff cannot sustain claims for failure to prevent harassment because Plaintiff has not  
 15 adequately pled that any underlying harassment occurred. The Court should strike the term  
 16 "harassment" from Plaintiff's fourth cause of action against BlackBerry for failure to prevent  
 17 harassment, discrimination, and retaliation.

18 Likewise, Plaintiff cannot use allegations of unequal pay as support for her eighth cause of  
 19 action (for discrimination) and ninth cause of action (for failure to prevent discrimination and  
 20 retaliation) because she has failed to plead a plausible claim for disparate pay under section  
 21 1197.5. The Court should strike all unequal pay allegations from Plaintiff's eighth and ninth  
 22 causes of action.

23 **III. CONCLUSION**

24 For the foregoing reasons, Defendants respectfully request that this Court grant the Motion  
 25 to Dismiss the FAC and Motion to Strike.

26 \_\_\_\_\_  
 27 defense to an Equal Pay Act case. ECF No. 38 at 13. Defendants do not suggest that Plaintiff was  
 28 required to plead her pay to sustain a claim—but rather that her decision to omit that fact renders  
 her claim even less plausible.

1 DATED: October 28, 2024

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2  
3 By:



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6 CORPORATION and JOHN GIAMATTEO  
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